

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1583 Relating to Water and Wastewater Utilities
SPONSOR(S): Goodlette
TIED BILLS: **IDEN./SIM. BILLS:** SB 2668, SB 372

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Business Regulation</u>	<u>36 Y, 0 N</u>	<u>Holt</u>	<u>Liepshutz</u>
2) <u>Natural Resources</u>	_____	_____	_____
3) <u>Subcommittee on Transportation & Economic Appr</u>	_____	_____	_____
4) <u>Appropriations</u>	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

The Florida Interlocal Cooperation Act of 1996 authorizes local governments to enter into interlocal agreements that allow these governmental entities to act more efficiently with regard to the provision of services and facilities. In 1997, s. 163.01, F.S. was amended to allow municipalities and counties to form a “separate legal entity” in order to acquire and operate water and wastewater utilities. These separate legal entities are not subject to the jurisdiction of the Florida Public Service Commission (PSC). However, s. 367.071(4)(a), states that the sale of waste or wastewater facilities shall be approved, as a matter of right, by the PSC. After a separate legal entity has acquired a water utility, it is self-regulated and has sole authority over rates and terms and conditions of service. State-imposed limitations on rates assessed to customers do not apply to a separate legal entity formed under s. 163.01, F.S., although the limitations apply to municipalities that own water utilities. The existing statute is silent on issues such as notice to other local governments, or who would represent the interests of customers who reside outside the member’s boundaries. The December 2002 OPPAGA Report on intergovernmental authorities noted that current law does not ensure that local governments can acquire by eminent domain a utility owned by a Chapter 163, F.S.

The bill substantially amends current law to provide that separate legal entities that are created under s. 163.01 may become subject to PSC jurisdiction if the host government or 10% of the utility customers file a petition with the PSC seeking binding arbitration by the PSC of proposed changes to the initial or subsequent rates and charges by the separate legal entity. Definitions are provided for implementation of the changes.

Intergovernmental entities seeking to acquire a utility must meet certain notice requirements. Adoption of a prohibition resolution by the host government relating to the acquisition of a utility must be voiced within a specified timeframe. The bill provides that a host government may use eminent domain proceedings to acquire the utility if the host government cannot agree with the separate legal entity on the terms and conditions. A “host government” is defined as either the city or the county government, whichever has the largest number of equivalent residential connections served by the utility.

The bill deletes the exemption for separate legal entities created pursuant to s. 163.01(7)(g)1., F.S., from the requirements of Chapter 120, F.S., Administrative Procedures Act. Also the definition of “Governmental Authority” is amended to exclude Chapter 163, F.S., created entities relating to the sale, assignment, or transfer of certificates of authorization, facilities, or control.

Further s. 367.0813, F.S., is created to address gains or losses on the sale of condemnation by a governmental authority.

There is an indeterminate fiscal effect on local government.

This act takes effect upon becoming law and shall apply to all contracts pending on that date.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|-----------------------------|-----------------------------------------|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

B. EFFECT OF PROPOSED CHANGES:

BACKGROUND

The Florida Interlocal Cooperation Act of 1996 authorizes local governments to enter into interlocal agreements that allow these governmental entities to act more efficiently with regard to the provision of services and facilities. In 1997, s. 163.01, F.S. was amended to allow municipalities and counties to form a "separate legal entity" in order to acquire and operate water and wastewater utilities. The first such entity created was the Florida Governmental Utility Authority (FGUA). The FGUA was created on February 1, 1999, and bought six water utilities from a private company on April 15, 1999. In September, 2001, it began negotiations with another private company, Florida Water Services Corporation (FWSC), to buy that company's utilities. The FWSC owns 156 utilities in 25 counties, serving over 500,000 customers. Most of the utilities are small, having fewer than 3,300 customers.

After approximately a year of negotiations with the FGUA, the FWSC announced in September, 2002 that it would sell its utility systems to the Florida Water Services Authority, a separate legal entity comprised of the towns of Gulf Breeze and Milton, Florida. Numerous lawsuits were filed over the proposed acquisition, and the PSC asserted jurisdiction to review whether the sale was in the public interest. The PSC issued an order requiring FWSC to file an application for approval of its proposed transfer to Florida Water Services Authority. Following issuance of the order, the PSC sought and received temporary injunctive relief to delay the proposed sale pending further review by the PSC. The First District Court of Appeal refused to overturn the commission's order delaying the sale. The Florida Water Services Authority announced its intention to finance and close the sale even if contrary to the PSC's order. On March 7, 2003, in an order from the Circuit Court of the Second Judicial Circuit, the temporary injunction was continued. Subsequently, FWSC announced it would not sell its utility systems to the Florida Water Services Authority.

During these negotiations, the Legislature became concerned about the proposed sale and the Joint Legislative Auditing Committee directed the Office of Program Policy Analysis and Governmental Accountability (OPPAGA) to conduct a review of the separate legal entities or intergovernmental authorities created under s. 163.01(7)(g), F.S. The review was to focus on the following issues:

- The specific purpose of intergovernmental authorities as well as any public benefit derived therefrom;
- Whether intergovernmental authorities are sufficiently accountable to the public and customers;
- Whether it would be sound public policy for the PSC to have jurisdiction over an intergovernmental authority's services and rates; and
- Alternative courses of action that would improve the accountability, efficiency, and economy of intergovernmental authorities.

OPPAGA found that economic regulation of water utilities is fragmented, with utilities owned by private companies regulated by either the PSC or the county in which the utility is located, and utilities owned by counties, municipalities, and intergovernmental authorities self-regulated.

OPPAGA found that intergovernmental authority ownership of water utilities may achieve financial benefits as the authority may be able to better meet capital expenditure needs and to realize operating efficiencies. As they are government entities, intergovernmental authorities can reduce the cost of financing capital improvements by issuing tax-exempt bonds. They also may be exempt from certain state and local taxes and may be eligible for some federal and state fund programs, which private utilities would not be.

Intergovernmental authorities are also an effective way to consolidate the operations of small utilities, for example centralized billing and customer service, which can achieve efficiencies and economies of scale not available to those small utilities. These consolidation benefits can result in lower prices, which can then be spread over a larger customer base, and in improved services.

However, OPPAGA also found several possible disadvantages. Most customers of utilities not owned by an intergovernmental authority are assured oversight and representation by some means; customers of privately-owned utilities have representation through the regulatory process of either the PSC or the county and customers of a government-owned utility that reside within the boundaries of that government have representation through their elected local government. In contrast, intergovernmental-authority-owned utilities are self-regulated and may own utilities outside their governmental boundaries, so there is a question as to whether the interests of customers residing outside the territorial limits of the local governments forming the intergovernmental authority will be fairly represented. Even customers represented by a member government may not be sufficiently protected as current statutes do not require that member governments approve changes in rates or services.

Another potential problem is that local governments may not be able to acquire a utility owned by an intergovernmental authority. The statutes allow local governments to acquire privately-owned utilities through negotiated purchase or eminent domain. This can assist in long-term growth planning and in assuring accountability to customers. It is uncertain that a local government could exercise eminent domain power over property owned by an intergovernmental authority.

Additionally, the intergovernmental authority may not realize the efficiency and economy of scale cost savings, or even if it does, it is not clear those savings would be passed on to customers. Finally, the state and local governments may lose some tax revenues as a result of the acquisition.

Based on these findings, OPPAGA recommended the following amendments to s. 163.01(7)(g), F.S.

- An intergovernmental authority seeking to acquire a water utility should be required to obtain the affirmative consent of the county or municipality where the majority of customers reside as a condition of the acquisition. Should the relevant county or municipality not approve the acquisition, that specific acquisition would be removed from the proposed acquisition agreement. This would help assure representation of customers through their local government. It would also give the local governments some leverage in the negotiations of purchase price and sale terms and in assuring that benefits of intergovernmental ownership are passed on to customers.

- A process should be created under which, when customers do not agree with the rates and terms of service provided by an intergovernmental authority, they may request their local government to petition the PSC for arbitration services. The PSC would be required to develop and promulgate rules to govern the process and to determine the fee for dispute resolution services.
- Similarly, a process should be created under which a county or municipality that is seeking to acquire a utility from an intergovernmental authority and that is unable to come to terms with that intergovernmental authority may petition the PSC for "redress," presumably facilitation of the negotiated purchase. Again the PSC would be required to promulgate rules governing the process and to determine the fee for services.

PROPOSED CHANGES

Section 1. A separate legal entity created under s. 163.01(7)(g)1, F.S., is not subject to PSC jurisdiction. Unless the host government, or at least 10% of the customers of the utility system being acquired, files a petition with the PSC seeking approval of the acquisition and binding arbitration of proposed changes to the initial or subsequent rates and charges of the acquiring legal entity.

The Following Definitions are Provided in the bill:

- "Host government" means either the governing body of the county, if the largest number of equivalent residential connections currently served by a system of the utility is located in the unincorporated area, or the governing body of a municipality, if the largest number of equivalent residential connections currently served by a system of the utility is located within that municipality's boundaries.
- "Separate legal entity" means any entity created by interlocal agreement the membership of which is limited to two or more municipalities or counties of the state but which entity is legally separate and apart from any of its member governments.
- "System" means each separate water or wastewater facility providing service.
- "Utility" means a water or wastewater utility and includes every person, separate legal entity, lessee, trustee, or receiver owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation.

Initial Acquisition of a Utility by a Chapter 163, F.S., Separate Legal Entity

A separate legal entity seeking to acquire a utility must notice (1) the PSC and (2) the host government in writing not less than 30 days before the proposed transfer. Notice must include information identified in s. 367.071(4)(a). Within 30 days of receipt of notice, the host government may: (1) adopt a resolution to become a member; (2) adopt a resolution to approve the acquisition; (3) adopt a resolution to prohibit the acquisition but include comments that would make the proposal acceptable, or (4) request an automatic 45-day extension. If the host government adopts a resolution to become a member, the legal entity must accept membership on the same basis as existing members before transfer. If the host government adopts a resolution to approve the acquisition, the parties shall negotiate the acquisition. If the host government adopts a resolution to prohibit the acquisition, the Chapter 163 entity may not acquire the utility without specific consent of the host government by future resolution. If the host government takes no action (approve, prohibit, request extension), the Chapter 163 entity may acquire the utility after a 30-day notice period. Ten percent (10%) of the utility customers of the entity may petition the PSC to consider whether the sale, assignment or transfer is in the public interest pursuant to s. 367.071(1).

Rates and Charges

The host government can review the initial and any later rates, charges, customer classifications, and terms of service for fairness and reasonableness. The host government can review and approve changes in financing that may result in increased costs to customers, subject to the obligations of the Chapter 163 entity to establish rates and charges that (1) comply with any resolution or trust agreements relating to the issuance of bonds to acquire and improve the affected utility and (2) are sufficient to pay debt service on its obligations. The Chapter 163 entity must notify the host government in writing 90 days before it implements any proposed changes; notice must contain the information identified in s. 367.081(2)(a)1, F.S. The host government may (1) pass a resolution finding that the proposed changes are in the public interest or (2) enter into negotiations with the Chapter 163 entity to resolve the concerns. If no agreement is reached within 30 days after the host government determines that the proposed changes are not in the public interest, the host government or the Chapter 163 entity may request binding arbitration through the PSC. The PSC shall (1) develop and adopt rules governing the administrative process, and (2) establish fees. The arbitration shall be conducted within 90 days after the request. The arbitration order shall ensure that the new rates recover applicable costs of service, including costs of financing, and provide for a reasonable rate of return.

Prohibiting Transfer of Funds

Revenues or user fees may not be transferred or paid to a legal entity, county, or city, from customers that are not physically located within the jurisdiction or service area of the member, county or city receiving the transfer or payment and may only be transferred or paid to a member or local government from user fees or revenues generated from customers that are physically located within the jurisdiction or service area of the member or local government receiving the transfer or payment.

Subsequent Utility Acquisition by Host Government

The host government may use eminent domain proceedings to acquire the utility if it cannot agree with the separate legal entity on the terms and conditions.

Section 2. Subsection 1 of s. 120.52., F.S. is amended to delete the exemption for entities created pursuant to chapter 163, from the Administrative Procedure Act.

Section 3. The definition of "Governmental Authority" means a political subdivision, as defined by s. 1.01(8), a regional water supply authority created pursuant to s. 373.1962, or a nonprofit corporation formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility. Separate legal entities created pursuant to s. 163.01, F.S., are excluded from this definition.

Section 4. Section 367.071, F.S., is amended to clarify that the sale of a utility to an intergovernmental authority is not approved as a matter of right.

Section 5. The bill creates s. 367.0813, F.S. to address gains or losses on the sale or condemnation by a governmental authority of a utility's assets. Gains and losses that result in the loss of customers served by those assets and the associated revenue stream shall be born by the shareholders of the utility.

Section 6. Provides a severability clause in the event any provision of this act or its application is found invalid, the invalidity does not affect other provisions or applications of the act.

Section 7. This section applies to all transactions prior to and after the effective date of the section.

C. SECTION DIRECTORY:

See above section by section Effect of Proposed Changes.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES